INDEX.

ALPHABETICAL LIST OF ALL CASES REFERRED TO, TOGETHER WITH REFERENCES TO PAGES WHERE CITED.

INDEX TO CASES—Continued.

IN THE

Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

An action in trespass brought in the (former) Circuit Court for the Eastern District of Pennsylvania under the Railroad Employers' Liability Acts of Congress of 1908 and 1910, by the widow, appointed administratrix, on behalf of herself and two minor children, to recover damages for the alleged wrongful killing of her husband by reason of the negligence of the employing railroad company, its servants and employees.

Defendant in error, in its brief, filed and served on counsel for plaintiff in error at this very late day, January 3, 1913, has gone into an extended argument on every point raised by it at the trial of the case in the circuit court below, as well as on its appeal to the Circuit Court of Appeals. The Circuit Court of Appeals reversed the finding of the jury in the lower court on just one point or question, viz., *res adjudicata. Non constat,* therefore, that there was any other error in the trial; and it must be taken that, as to all other matters and points in the case, the lower court is affirmed.

The appeal to this Court from the Circuit Court of Appeals is based upon just the one question upon which the Circuit Court of Appeals reversed the lower court, that of *res adjudicata;* the assignments of error refer to this one question; and this court is asked by plaintiff in error to reverse the judgment of the Circuit Court of Appeals on this question and to reinstate the verdict of the lower court in favor of plaintiff in error.

If, however, this Court believes it wise and proper, to go into the whole case and all the points raised by defendant in error in the lower court and in its appeal to the Circuit Court of Appeals (as defendant in error assumes in its printed brief), then plaintiff in error asks leave of this Court to file this supplemental brief and full history of the facts of the case and of the happening of the accident.

SUPPLEMENTAL STATEMENT OF THE CASE.

The deceased fireman, Joseph Daniel Troxell, was not quite twenty-three years of age at the time of the accident which caused his death. He was a man of fine physique, in perfect health, who only laid off once for three days when he had a sprained shoulder (pp. 16 and 26), of good habits, a dutiful husband, able and attentive to his work, ambitious and studious to be promoted (p. 32), and altogether apparently an ideal member of society and railroad employee. Previous to the accident he had been working for the defendant company thirty-three months (pp. 83 and 84). For the first few months he was a brakeman, and then he became a locomotive fireman, which latter position he held, and at the duties of which he was engaged when killed. The particular division of the Delaware, Lackawanna and Western Railroad Company he worked on is what is known as the Bangor and Portland Division, running from the town of Nazareth to Portland in northeast Pennsylvania, where it connects with the main line, and tapping, as a matter of common knowledge, the rich cement and slate regions of Pennsylvania. Deceased himself lived with his young wife and two babies, one aged six years and the other three, at Nazareth, Pennsylvania.

Early on the clear, sunshiny morning of Wednesday, July 21, 1909 (p. 15), Troxell, the deceased, left his home and family at six o'clock to take his place on his engine. His train, a freight train of fourteen loaded cars and a caboose (p. 64), pulled out from Nazareth about 7.15 (p. 63). The train proceeded on its way to Belfast Junction, a few miles from Nazareth,

where, after doing a little shifting, it again started up, and had gone possibly a mile beyond Belfast Junction, not yet under full headway, and running at the rate of only seven or eight miles an hour (pp. 29, 30 and 63) when, as the locomotive of the train was going around a sharp curve to the left, it was met head on, without any warning whatsoever, by six gondola cars, loaded with ashes, running wild at a speed variously estimated at forty-five or fifty or more miles an hour. The locomotive and several cars of the train were demolished and derailed, and Troxell was caught in the wreckage and probably instantly killed, although his body was not obtained for several hours (p. 31). It appeared that these six loaded cars had started in motion of themselves and had run away from a siding near the town and station of Pen Argyl all the way to the point of collision, a distance of some five and a half or six miles (pp. 31, 63 and 108). The siding from which the cars came was a short siding leading to a slate quarry along the side of the track, and was known as Albion No. 2. This siding was a few hundred feet long and connected with the Pen Argyl branch, or spur, at a distance about three or four hundred feet from Pen Argyl Junction, where the Pen Argyl spur joined with the main line (pp. 39, 40, 41, 42, etc.). The Pen Argyl branch itself is a blind spur, ending at the Pen Argyl station, and was variously estimated at being from a quarter of a mile to half a mile in length (p. 39). Pen Argyl Junction is the top of the mountain—the water shed—and from it the grade descends sharply in both directions for miles (pp. 49 and 132). One witness testified he thought there was

a slight up-grade for a short distance along the line before one got to the point of collision (p. 32), coming from Pen Argyl Junction. The civil engineer, produced by plaintiff in error, asserted he had been careful to go over the entire right of way of the scene of the accident, and that it was a descending grade all the way down to where the collision occurred (p. 108). At all events, all witnesses agreed that at the time of the accident the runaway cars were going at terrific speed, and all witnesses agreed that it was a descending grade from the siding where the cars were placed and from which they ran away down to the Pen Argyl branch, and from the branch down to the main line, and from the main line on to the point of collision and beyond (pp. 30, 31, 43, 108 and 131). The grade was sufficient on the Pen Argyl branch and siding, from which the cars came, to allow cars to move of their own momentum, unless they were very carefully placed (p. 45).

On the siding itself, Albion No. 2, from which these cars came, there was hardly any perceptible grade for the first hundred feet, making it for that distance practically level, and from that point on the grade rose quite sharply (pp. 108 and 109). On this siding, too, there was no safety or derailing switch where it connected with the Pen Argyl branch (p. 47), a simple and inexpensive device, which, it was testified to, is employed on similar roads in the ordinary and general practice (p. 137). This safeguard is used on all mountain roads, or roads with descending grades or branches, spurs or sidings, and effectively prevents cars, beyond control, from getting away and

running on to the main line. That cars do sometimes run away from sidings and spurs is a matter of common knowledge. This simple expedient intercepts the cars before they get started on their mad career, catches their wheels, and keeps them from running on the main line, thereby endangering the lives of passengers and employees, to say nothing of loss of property (pp. 134 to 138).

All about this section of Pen Argyl Junction and Albion Siding No. 2—right alongside the tracks as a matter of fact—are immense slate quarries, with constant and heavy blasting reverberating among the hills of refuse slate (pp. 37, 38, 85, 93 and 98).

Now it so happened that the dead man's crew (which was the regular day freight crew) on account of an accidental derailment of one of their cars while they were passing through, just beyond Pen Argyl Junction (pp. 66 to 73), in order to get around the junction and get the rest of their train through on the main line, had two days previous to the accident, on Monday, July 19, 1909, pushed these six loaded ash gondola cars on this very siding, Albion No. 2, and left them there. But when Troxell's crew put the cars on the siding, *they put them with the first car about fifteen feet from the frog of the switch* (p. 72). Troxell was acting as engineer on this occasion (pp. 34 and 35), and had no occasion to observe if there was or was not a derailing switch on the siding. Nor does it appear affirmatively anywhere that he ever had occasion, in the course of his duties, to go on this siding in such a way as to be able to learn for himself whether or not it had a derailing switch. Here

these cars were left by Troxell's crew, and up to Troxell's death, two days thereafter, he never had occasion to believe these cars were in any position other than where his engine had put them—*fifteen feet beyond the point of the frog*—because he never went up there afterwards and his regular run only took him on the main line, some considerable distance below, and with these cars standing on the siding unobservable, up the Pen Argyl branch around the curve.

Now, even supposing for the time being (for which there is no warrant), that Troxell might have known of the absence of a derailing device, the significance of all this is apparent, when it transpires that on the following day, Tuesday, July 20, 1909, the Pen Argyl yard crew, utterly without Troxell's knowledge (p. 40), had occasion to put some empty box cars back on this siding for the use of the quarry, and to accomplish this removed the six ash cars, and *replaced them with the first car from* 175 *to* 180 *feet from the point of the switch* (p. 41). Remembering the gradients of this siding, that for the first one hundred feet it is practically level, and that each of these ash cars was, including bumpers (p. 39), about thirty-six feet long, it will readily be seen that in the position in which Troxell's crew left the cars, it was impossible for them to run away (p. 111), while in the position in which the yard crew put them, it was not only possible for them to run away, but, as a matter of fact, they actually did run away.

These six loaded cars stood there on that steep siding unattended and unlooked after for twenty-four hours before they ran out of their own volition. The

yard crew who put these cars on the siding testified that they put the brakes on by hand on five of them, and threw a block under the front wheel of the first car (pp. 61, 219 and 228), but made no examination of the brakes to see if they were in good condition, and would hold (p. 219). This despite the fact that three of these cars were in a train that had been derailed and wrecked at this point two days before this (pp. 66 to 72), and that there should have been an inspection of braking apparatus after such derailment (p. 169). The evidence is also and uncontradicted that the mere putting on of a brake on a car is no fair or proper test of the brake's efficiency, and guarantee that the brake will hold (pp. 153 to 166). Especially is this so with reference to cars placed in the vicinity of blasting quarries (pp. 166, 167 and 168).

At the trial the yard crew admitted that they had indifferently and perfunctorily put on the brakes on only five cars, and carelessly kicked or threw under one or possibly two blocks (pp. 60, 61, 219, 220, 221, 232 and 233). *The railroad company's own expert and official admitted and stated that it was the positive duty of the trainmen to brake and block all six cars* (pp. 270 and 271).

After an exhaustive search on behalf of the plaintiff below she was enabled to produce four disinterested witnesses who saw the cars escape and start to run away. Three of these witnesses testified they were working on a dump of the Parsons' Slate Quarry, quite close to the track, directly opposite where this siding, from which the cars ran, joins the Pen Argyl branch or spur, and were high up in the air with nothing to obstruct their vision, having a bird's-eye view of the

entire scene. They saw the cars almost immediately as they started to move, and one witness says his attention was attracted by the loud screeching of the wheels. At that time, of course, the cars were moving very slowly, but before these men could get down from their elevated position, and give warning or stop the cars with increased momentum they had passed on down the track (pp. 84 to 105). All these witnesses unite in saying that no one in any way interfered with these cars, that no one was near them at the time, and that they started to move of their own accord. *The fourth of these witnesses said* (pp. 98 to 100) *that he walked near these cars on his way to work about a quarter to seven on the morning of the accident, and then noticed that the block under the front car was almost cut in two. The cars ran out about an hour later* (p. 31). *On the previous afternoon he had passed by at the same place and had noticed the flange was cutting into the block, but was not so deep; indicating, of course, that the brakes were not holding, and that the cars were gradually slipping down hill, being only held up by the few remaining fibres of wood.*

The siding from which these cars ran—Albion Siding No. 2—had no derailing device (p. 47) to catch and hold, or trip them, as one might say, and prevent them running down on the main line, thus protecting the life and limb of helpless workmen and passengers. It was in testimony and uncontradicted that derailing devices in situations such as this have been in use since 1890 or 1891, and was the ordinary and customary practice at the time of the accident (pp. 116 to 126 and 134 to 138). That they were cheap in cost and simple to operate. One of these witnesses, so testi-

fying, an engineer of large experience, had been prominently connected with this very defending railroad (pp. 129 to 132), knew intimately its lines and practices, and was well acquainted with the locality of the accident.

The only other sidings near the siding from which these cars came were two—Albion Siding No. 1 and West Albion siding. Albion Siding No. 1 was connected at both ends with the main line, and was used merely as a passing track and not for loading or standing cars and, of course, had no derailing switches (pp. 42 to 47). *West Albion siding, a siding very close to Albion siding No. 2, from which these cars ran, and similar in grades and all practical respects to Albion Siding No. 2* (p. 48), *had two derailing switches,* one on each end, while Albion No. 2, the siding of accident, had none.

At the conclusion of the testimony the learned trial judge below struck out and took from the consideration of the jury all evidence relating to the absence of a derailing device on this particular siding, and the necessity for one there, together with all evidence as to the practice of installing derailing devices, and the custom thereof, declaring that this had all been adjudicated adversely to the plaintiff below by the decision of the Circuit Court of Appeals in the former and common law suit, reported in 183 Fed. 373 (pp. 293 to 298). The only question therefore left for the jury's consideration was the one of fact whether these cars had been negligently and improperly placed on the siding by the yard crew, and left to remain there in this condition (pp. 298 to 304).

The jury found a verdict for the administratrix in the sum of $10,196.50.

ARGUMENT

At the trial in the court below, as formally stated and placed on the record at the conclusion of the trial (pp. 304 and 305), the reasons given by counsel for defendant in error for binding instructions in its favor were three in number:

> "1. *That the Federal Employers' Act of April 22, 1908, is unconstitutional.*
>
> "2. *That the submission in this case to the jury is that employees engaged in intrastate commerce caused the injury, and that such negligence does not come under the terms of the act.*
>
> "3. *That the uncontradicted evidence on both sides shows no negligence on the part of the defendant company.*"

Afterwards, thirty-two reasons, touching upon every conceivable phase and aspect of the case, were filed for a new trial.

All of these matters were in due course gravely and exhaustively argued. When the motion for judgment for defendant in error, *non obstante veredicto*, and the new trial were refused, these matters were all given as assignments of error.

The logic of succeeding events and the decisions of this Court have forcibly convinced defendant in error of the unreliability and ineffectiveness of the first and second reasons given for binding instructions in its favor, and which were the ones most earnestly and confidently pressed upon the attention of the court below, and left remaining but the third reason, which, when confronted with the evidence, is the flimsiest and most tattered of shreds.

In the meantime, also, the thirty-two reasons and assignments of error dwindled to twelve, which were the assignments relied upon in the appeal to the Circuit Court of Appeals.

EXPERT TESTIMONY WAS PROPERLY ADMITTED AT THE TRIAL.

Defendant in error contends that expert testimony on behalf of plaintiff in error was improperly admitted at the trial below. It studiously avoids in its brief mentioning one of plaintiff in error's experts, Mr. Weeks, but concentrates its attack upon the evidence given by the second expert, Mr. Riegel. Doubtless this is because this gentleman once occupied a responsible and high position with the defendant in error railroad company. Mr. Riegel is an engineer of the highest standing and great experience, without any embarrassing connections whatsoever, having independent offices in Scranton, Pennsylvania, is thoroughly competent and skilled, knows, one might say, almost every foot of the Delaware, Lackawanna and Western system, and gave his testimony in a most fair, straightforward and modest manner. Indeed, at the time of the trial, it is not too much to say that he impressed almost everyone as acting as *amicus curiae* in testifying, rather than taking sides with either litigant. A reading of all his printed evidence in the record (pp. 129 and 147, etc.) will doubtless confirm this impression. Mr. Riegel is too eminently fair a man to be charged with taking sides, and was a most conscientious witness.

Mr. Riegel has been employed by defendant in error railroad company as its own expert (p. 147), and

therefore it cannot consistently attack his qualifications. It is submitted that the testimony of Mr. Riegel as an expert for plaintiff in error, to which testimony defendant in error seems to take particular exception, was especially proper, pertinent and efficacious in instructing both the court, counsel and jury as to facts regarding the issue involved.

The testimony of Mr. Weeks was largely as to facts gained by a survey of the particular siding and locality, the conditions of which had not been changed between the time of the accident and the survey. He also testified as to other facts and matters. So far as the expert testimony of both Mr. Weeks and Mr. Riegel is concerned, it is respectfully submitted that they were both properly qualified to give this testimony, especially in the case of Mr. Riegel.

It will need only a brief reference to and comparison with the assignments of error by counsel for defendant in error in its appeal to the Circuit Court of Appeals on this point, and the testimony as shown in the record, to perceive that when counsel for defendant in error took the exceptions on which these assignments are based they overlooked or forgot some of the facts in evidence. These particular cars, of course, that ran away, or most of them, were wrecked, utterly destroyed and burned. But they were identified as belonging to a certain class of cars (pp. 39, 40, 144 and 145), and the expert testimony was given upon this knowledge (pp. 150 and 153).

Although complaining of this evidence now, and having forgotten at the time that these wrecked cars were identified by their class, etc., counsel for defend-

ant in error, when their turn came to present evidence, qualified and obtained the benefit of the testimony of their own expert on brakes by this very identification by class (pp. 265 to 287).

As is said in the case of

Struthers vs. Philadelphia and Delaware R. R. Co., 174 Pa. 291 (1896):

> "An expert is a person experienced, trained and skilled in some particular business or subject. An expert witness is one who because of the possession of knowledge not within ordinary reach is especially qualified to speak upon the subject to which his attention is called. Thus, a chemist, a physician, a mechanic, an artist, has special knowledge of the things that fall within the range of his studies and his daily practice, and because of such special knowledge, not within ordinary reach, his testimony upon a subject relating to his particular line of study or research is regarded as more exact and entitled to more weight than that of witnesses not possessing the same opportunities for acquiring thorough knowledge of the subject."

Defendant in error seems to think that because Mr. Riegel did not see these exact cars that ran away, he was thereby incompetent to testify as an expert and give his opinion based upon his knowledge, experience and skill; and that Mr. Riegel could not testify as to other matters because he simply knew of them in the line of study and research, and could not say that they had ever come under his direct, personal eyesight. This is a clear error upon the part of defendant in error, because if this were true, much valuable and necessary expert testimony would be ruled out in

every case. As is said in the decision above, what a witness gets to know in the way of research and study in his particular line or profession, he can testify to, if thereby he can aid the court and jury in coming to a proper decision with reference to the matters in issue.

This is exactly what Mr. Riegel did, and to do this, undoubtedly to every reasonable mind at least who heard him, he was pre-eminently qualified, and most carefully and conscientiously discharged his duty in this regard.

As is said in the case of

Commonwealth vs. Farrell, 187 Pa. 408 (1898):

"Two things must concur to justify the admission of an expert witness:

(1) The subject under examination must be one that requires that the court and jury have the aid of knowledge or experience such as men not especially skilled do not have, and such, therefore, as cannot be obtained from ordinary witnesses.

(2) The witness called as an expert must possess the knowledge, the skill or experience needed to inform and guide the court and jury in the particular case. Upon such a question such a witness may be called *and may testify not merely to facts, but to conclusions from the facts.*"

It is thus seen that an expert is not limited to things which come directly under his experience, but that he can testify as to matters of which he has knowledge, both by experience and by study; and the expert can testify not merely to the facts alone, but to proper

and logical conclusions from those facts as gathered by his experience and knowledge.

Mr. Riegel certainly fulfilled his duty to the court below in this respect.

It would appear that this whole matter rests entirely in the discretion of the trial judge, who sees and judges of the witness at first hand. This has been held to be the law time and time again.

In the leading decision of

Ardesco Oil Co. vs. Gilson, 63 Pa. 146 (1869),

it is said:

> "The competency of a person to give his opinion as an expert, *if on a preliminary examination he appears to have any pretensions* to speak as such, rests much in the discretion of the judge trying the cause. It is not imperatively required that the business or profession of the expert should be that which would enable him to form an opinion."

Again, it is held in the decision of

Delaware and Chesapeake Steam Towboat Co. vs. Starrs, 69 Pa. 36 (1871):

> "Should the *court think an expert witness prima facie qualified,* the weight to be given his testimony is for the jury. *If it appears that the witness has any claim to the character* of an expert, a court of error will not reverse, because his experience is not sufficiently special."

In the present case Mr. Riegel's experience was altogether along the line of which he testified.

In the decision of

Stevenson vs. Coal Co., 203 Pa. 331 (1902),

the above doctrine as expressed in

Delaware and Chesapeake Steam Towboat Co. vs. Starrs, supra,

is quoted with approval.

And again, in the decision of

Ryder vs. Jacobs, 182 Pa. 624 (1897),

the Pennsylvania Supreme Court says that the question of whether a witness is a competent expert, and whether the contention be such as calls for expert testimony, is largely in the discretion of the trial judge, and will not be reversed by the upper court.

Of course, where the circumstances are such that they can be fully and accurately described to the jury, and their bearing on the issue estimated by persons without special knowledge or training, the opinion of experts is inadmissible, and the court may so hold at the time when the expert testimony is offered.

Graham vs. Pennsylvania Co., 139 Pa. 149 (1891);
Canfield vs. Johnson, 141 Pa. 61 (1891);
Whitaker vs. Campbell, 187 Pa. 113 (1898);
Bardsly vs. Gill, 218 Pa. 56 (1907).

But that such was not the case here, and that the court and jury needed the testimony of persons peculiarly trained, experienced and with knowledge upon this special subject, will hardly admit of argument. The case was one where expert opinion was absolutely requisite for a full enlightenment of the court and jury upon the subject matter.

This same doctrine has been approved universally by the Federal courts. In the case of

Chicago, R. I. & P. R. R. Co. vs. Hale, 176 Fed. 71 (1910),

the appellate court says:

> "That the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that persons without such skill or knowledge, and presumptively the jurors, are likely to prove incapable of forming a correct judgment relative to the matter in hand without the aid of such opinions."

This doctrine was likewise upheld in the Circuit Court of Eastern Pennsylvania, in the decision of

American Car and Foundry Co. vs. Thornton, 183 Fed. 114 (1910).

In the case of

City of Woburn vs. Adams, 187 Fed. 781 (1911),

it is held that the question of the admission or rejection of expert testimony is largely one of discretion. Such testimony should be admitted if the evidence shows that the experts are able to judge of the matter in question somewhat better than persons generally.

Again, and finally, Mr. Justice Moody, of the United States Supreme Court, in the decision of

Turner vs. American Surety and Trust Co., 213 U. S. 261 (1909),

uses this language:

> "The responsibility for the exercise of the judicial power of determining whether a given

witness has qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left with the judge presiding at the trial, who has a comprehensive view of the issue and of all the evidence and the witness himself before his face."

It certainly comes with very poor grace for defendant in error to complain of the evidence of plaintiff in error's experts, when the court below permitted defendant in error (under objection and exception, pp. 234 and 251), through two experts, to give evidence of experiments carried on with specially picked cars, long after the accident, not placed at the point from which these cars ran away, and allowed to stand only a few minutes.

Such evidence, in the estimation of plaintiff in error, was highly improper.

ALL EVIDENCE CONCERNING DERAILING DEVICES WAS CAREFULLY STRICKEN OUT.

Defendant in error contends that the lower court committed error in admitting evidence at the trial concerning the absence of a derailing switch on the siding from which these cars ran, the ordinary and customary usage of derailing devices at similar places at the time of the accident, the simplicity of their operations, etc. This, despite the fact that the court below explicitly and sweepingly, before the case went to the jury, struck out all this testimony, expunged it from the record, and directed the jury to give it no consideration, on the ground that this part of the case was *res adjudicata.*

This direction was given in the most forcible and

unmistakable language (pp. 293 to 298). To attempt to seriously argue that an intelligent and fair-minded jury, such as we uniformly have in the Federal courts, would disregard this instruction and find a verdict contrary thereto, borders on the incredulous.

To order evidence which the court considered improper stricken off and to be disregarded is the regular practice and no error.

It can safely be taken for granted that the jury obeyed the trial judge in this injunction and found a verdict for plaintiff in error on the other evidence in the case, as it had ample ground and reason to do.

But was the court below justified and warranted in withdrawing this evidence from the jury's consideration and striking it from the record? Had this matter been adjudicated, when the present case is between different parties and brought on a different cause of action from the previous common law action?

Although the trial judge below conscientiously struck out of the case every vestige of evidence concerning derailing devices, in conformity, as he believed, with the ruling of the Circuit Court of Appeals in the common law decision, reported in 183 Fed. 373, plaintiff in error contended at the trial that the court below was wrong in so doing, and took an exception to the court's ruling (pp. 209, 294 and 305). Plaintiff in error still contends for this point and bases her argument upon the decisions as given in her first brief under the head of *res adjudicata,* although, of course, the final verdict cured whatever harm, if any, was done plaintiff in error in this matter, if she is right in this contention.

In the trial below plaintiff in error showed that derailing devices had been known, approved and in use for over twenty years, that they were not extraordinary or new-fangled devices, but were in ordinary and common use at the time of the happening of this accident, that they were cheap, simple of operation, expedient and practicable, and should have been used on this siding. That defendant in error railroad company itself was using them at the time all over its road and on other and similar sidings (pp. 112 to 118 and 134 to 137). Not only did plaintiff in error's witnesses say this but defendant in error's own witnesses admitted it (pp. 240, 284 and 285).

Nevertheless, all this testimony was stricken out by the trial judge and removed from the consideration of the jury on the theory that it had been adjudicated.

THE CASE WAS PROPERLY AT ISSUE

Defendant in error sees fit to complain that the case was not at issue. Defendant in error filed two pleas, one of "Not Guilty" and the other of "Res Judicata." To the second plea of *res judicata,* plaintiff in error filed a motion to strike off. After argument before the court below that motion was refused, and upon that refusal plaintiff in error took an exception and defendant in error took judgment. An appeal was taken by plaintiff below on this judgment to the Circuit Court of Appeals. The Circuit Court of Appeals dismissed that appeal for the reason that this was not a definitive judgment. Thereupon, the case was again relegated to the court below, and plaintiff in error ordered the same upon the trial list, claim-

ing and believing that the same was at issue upon defendant in error's plea of "Not Guilty," and, having done all that was possible in moving to strike out the other plea, treating defendant in error's other plea of *"Res Judicata"* as a nullity and mere surplusage.

Plaintiff in error followed this course upon this theory:

Under the present Procedure Act in Pennsylvania, which, of course, controls the Federal courts within this jurisdiction, special pleading is now abolished. Section 7 of the present Procedure Act of May 25, 1887 (P. L. 271), provides:

> "Special pleading is hereby abolished. In the action of assumpsit, the plea of the general issue shall be non assumpsit. The defendant in the action of assumpsit shall be at liberty, in addition to the plea of 'non assumpsit,' to plead payment, set off and also the bar of the statute of limitations, and no other plea. The only plea in the action of trespass shall be 'Not Guilty.' The defendant shall plead to the said actions within fifteen days after the return day, and, in default thereof, the court may, on motion, direct the prothonotary to enter the plea of the general issue at any time. The pleadings in all courts to be subject to the rules of the respective courts as to notice of special matter."

Under this Procedure Act, it has been decided that when there is a plea of "Not Guilty" in a trespass case, although other pleas are filed therewith also, the cause is before the jury on all issues on the general plea, and all defenses can be given in evidence under the general issue.

Chestnut Hill, etc., Turnpike Co. vs. Piper,
77 Pa. 437 (Sharswood, judge) (1875).

It has been decided time and again that to join a plea in abatement with a plea in bar is incongruous and inconsistent, and plaintiff may elect which he will have stricken off. Maitland vs. McGonigle, 1 *Troubat & Haly's Practice, Sec.* 519 (1880); *Potter vs. McCoy,* 26 Pa. 458 (1856); *Gallagher vs. Thornley,* 10 *W. N. C.* (*Pa.*) 189 (1881).

In every decision cited by defendant in error in its brief (and all those relating to actions *ex delicto* are old decisions) it is held that one of two things must be done: (1) The plea of *res judicata* replied to, or (2) a motion filed to strike it off. Plaintiff in error here did the latter.

In accordance with the provisions of the above act, it has been held that under the plea of "Not Guilty" in trespass, evidence of any defense whatsoever is admissible.

B. & O. Railroad Co. vs. Sulphur Springs School District, 96 Pa. 65 (1881);
Johnson vs. Railroad, 163 Pa. 127 (1894);
Heibling vs. Cemetery Co., 201 Pa. 171 (1902);
Edwards vs. Woodruff, 25 Pa. Superior Court, 575 (1904).

Certainly where the defense of *res adjudicata* can be fully availed of under the general plea of "Not Guilty," as it could be, and actually was, in the trial of this case, the additional plea of *res adjudicata,* combined with that of "Not Guilty," is inappropriate and is surplusage.

Moreover, even supposing for the sake or argument that the plea of *res adjudicata* and innumerable other pleas could be properly filed in conjunction with the plea of "Not Guilty," is there any reason under the sun, in view of the present universal practice in Pennsylvania in civil cases, why any replication whatsoever should be filed? Replications are never filed to the plea of "Not Guilty," nor need they be, nor are they, today filed to any other plea, except in an equitable proceeding. The filing of a replication is now generally conceded to be a mere formality, amounting practically to nothing at all, and universally disregarded.

Even further supposing, however, that a replication is necessary to a plea in the present practice, it has been held that the replication, being merely formal, may be filed at any time, even after the case has been called for trial, *venire* issued, and the defendant has objected that the case is not at issue.

Bruner vs. Gregg, 4 W. N. C. (Pa.) 368 (1878).

Surely, in the present instance, this raising of the point by the defendant in error that the case is not at issue on account of no replication having been filed to its second plea, is a mere technicality, of no weight whatsoever, because, supposing defendant in error is right in its contention, it was entirely harmless error and absolutely no injury was done to defendant in error, as defendant in error at the trial, availed itself fully of this defense of *res adjudicata,* and had the same exhaustively argued, considered and allowed by

the court below as a defense (pp. 204 to 209 and 293 to 298).

As was said in the case of

Wilkinson vs. Evans, 34 Penna. Superior Court, 475 (1907):

> "The defendant was in no way prejudiced by the introduction of the names of the shareholders, nor deprived of any opportunity or advantage which it would have had if they had been omitted. . . . The real issue was tried between the proper parties. It is not the policy of the law at the present time to encourage technical objections to pleadings which do not tend to promote the logical and expeditious administration of justice."

Especially is this true that no harm was done to defendant in error in this regard when we consider the sweeping decision by the Pennsylvania court that the only proper plea in a trespass case is "Not Guilty," under which a defendant can avail itself of all defenses, as set forth in

Zion Church vs. Light, 7 Penna. Superior Court, 223 (1897);

and in the very late decision of

Peterson vs. Wiggins, 230 Pa. 631 (1911),

showing precisely and pointedly how and when defendants can put in this defense of *res adjudicata* at the time of trial under the general issue plea of "Not Guilty."

This is exactly what defendant in error did in this case, and had the defense fully availed of and considered and acted upon by the court below at the proper time (pp. 293 to 298 as well as 204 to 209).

THERE WAS PLENTIFUL EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANT IN ERROR, OTHER THAN ABSENCE OF DERAILING DEVICES, UPON WHICH THE JURY FOUND ITS VERDICT.

Defendant in error complains that there is no sufficient evidence of negligence on its part, and that the jury was not warranted in finding a verdict in favor of plaintiff in error. Defendant in error then sets out in its brief some testimony which, it says, shows that it could not have been guilty of negligence.

Mere excerpts of testimony, taken and culled from the entire body as being that most favorable to one side or the other, are most unfair as well as unprofitable. A suit cannot be so decided, and plaintiff in error is not going to suppose for one moment that the Supreme Court will decide this case merely upon defendant in error's compilation of evidence which it believes favors its side of the case, without reading and knowing all the other evidence taken in connection therewith.

All the testimony quoted by defendant in error in its brief in its favor is testimony given by defendant in error's own witnesses in its defense or brought out in cross-examination from an employee under objection as not proper cross-examination.

All this evidence, too, was mere guesswork, that a certain number of brakes might hold a certain number of cars—*in the opinion of these witnesses.* Of what value is such testimony when confronted with the positive evidence that these six cars did actually run away and no one was near them or interfered with them in any way?

Indeed, there are Federal decisions to the effect that, even if the cars were interfered with by outside parties, the railroad company is responsible for leaving them in such a position and condition that they could be started by such interference.

Southern Pacific Co. vs. Lafferty, 57 Fed. 536 (Cal. 1893);
Continental Trust Co. vs. Toledo, A. L. & K. C. R. R. Co., 87 Fed. 133 (Ill. 1898).

But the trial judge did not hold the defendant in error to this strict duty.

The theory under which the trial judge sent the case to the jury was: Did or did not defendant in error's employees properly brake and block these cars when they placed them on the steep grade of this siding, and were the brakes in such a condition that they would hold the cars? This was a question of fact for the jury to determine from *all the evidence*. The court could not decide this as a matter of law, and this question was left to the jury in a most fair, clear and comprehensive charge (pp. 295 to 304). It will not require a fine tooth comb to discover plenty of evidence to support the finding of an intelligent jury in the negative of this proposition.

Now let us bear in mind first of all, remembering the steep grade of this siding (pp. 108 and 109), that although empty cars had previously stood on this siding without running away, *never before this accident, in the memory of old railroad men, had loaded, heavy cars been allowed to stand there.*

The evidence showing this occurs on page 227 of the record.

Quintus Ruch, conductor of yard crew, under examination:

"Q. You say you never heard of cars getting away placed on other sidings. Is that what you said?

A. Yes, sir; I said that.

Q. Do you know of any six cars placed in a similar position as these six cars at any time up there?

A. No. sir.

Q. You do not?

A. No, sir."

Again, page 232, William H. Grupe, of the yard crew, under examination:

"Q. You never saw loaded ash cars like these standing down near the Pen Argyl branch, on that siding before?

A. Not before; no, sir.

Q. Not before that?

A. Not to my recollection; no, sir.

Q. The only cars you saw standing there were the empty cars?

A. Empty cars.

Q. Never before this accident did you see six loaded ash cars standing in there in the same position?

A. No, sir."

Of what practical service, as throwing any light upon this accident, is defendant in error's vaunted testimony by its experts of its so-called testing of cars on this siding, when, admittedly, these tests were conducted on February 18, 1910—seven months after the occurrence—at a different time of the year, with a different class of cars from those which ran away, brakes

particularly fixed under the direct eye and supervision of leading officials of defendant in error's road, at a different spot and different grade of the siding where the cars had been standing which ran away, and the test cars were *allowed to stand there but five, ten, or at the outside,* fifteen minutes, as compared with twenty-four hours for the other cars (pp. 245, 246, 247, 258, 259, 260 and 261)? A greater variety and variance of conditions from those prevailing at the time of the accident could hardly be imagined.

Yet all this evidence in favor of defendant in error was allowed to go to the jury for what it was worth despite its unfairness and irrelevancy.

The evidence of defendant in error's employees themselves showed that their handling of these cars was negligent and careless in the highest degree for two main reasons:

1. *Because they made no fair or proper tests of the efficiency of the braking apparatus before leaving the cars standing and unwatched on the steep grade of the siding.*

2. *Because they did not even employ all the ordinary means at hand to hold the cars in their position, which it was their undoubted duty to do.*

Defendant in error called three of the yard crew of five in its defence. One was the engineer and the other two were brakemen who stated that when they placed the cars on the siding they put on the brakes "hard" by turning them by hand. They admitted they made no test of them to see if they would hold the cars, nor did they make any inspection of the braking appa-

ratus to see if it was in good working order. Merely turned the wheel by hand till it would go no further, and then went away about other business in other parts of the yard.

This was all they did, notwithstanding the fact that loaded cars had never before been left standing on this steep place, and that they knew that three of these cars, at least, had been in a derailing wreck the day before which had unquestionably jarred and strained all their underpinning, gear and braking parts.

That this derailment had been a violent one is shown by the testimony (pp. 66 to 71).

That the cars which had been in this wreck should have been inspected as to their breaks plaintiff in error showed by positive testimony.

John I. Riegel on the stand (pp. 168 to 169):

"By Mr. Demming:

Q. It has been testified here, after this derailment of a car on the train on Monday, the nineteenth of July, three of the cars were taken out of the train, and three cars immediately in front of the car that was derailed, and put upon this siding, in connection with three other cars that were found standing on West Albion siding, and no inspections were made of their brakes, of the three cars taken out of the train. Would or would not that derailment, with the train going eight miles an hour, as has been testified, at the time the derailment occurred, have any effect upon the brakes on those three cars?

(Objected to as leading.)

By Mr. Demming:

Q. Would it have any effect?

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

A. There would be some probability of the brakes being affected by such shock. An inspection would be the protection to exercise against any defects of that nature.

Q. Would it be proper and safe, so far as the main line is concerned, to stand three cars of that sort on a siding approaching the main line, on a down grade, without such inspection?

MR. CAMPBELL: Objected to as stating a conclusion, and as leading, and asking certain conditions not in the case.

THE COURT: I do not think we want any expert testimony on that.

(Objection sustained.)"

Again, cross-examination of John I Riegel (p. 179):

"Q. If the three cars coupled to the locomotive stopped, by reason of the breaking of the hose between the third car and the fourth car, and they came to an immediate stop, as you said before, is not that a very great proof that those brakes must have been in an efficient condition when they came to such a quick stop?

A. By no means.

Q. Why?

A. The brakes of the other cars in the rear of the train might have been efficient, and the brakes on the front might have been inefficient. His brake may have ruptured.

Q. If that is so, do you mean to say the brakes of those three first cars would not be affected at all?

A. I did not say so.

Q. Would there be any shock to those three front cars?

A. Yes, sir."

When they placed these cars on the siding the yard trainmen took no other precaution than turning

on the brakes, "hard," as they termed it, by hand. That this was not sufficient to justify a reasonable belief that the cars would stay there plaintiff in error showed by strong affirmative testimony as well as by the cross-examination of defendant in error's witnesses.

Testimony of John I. Riegel (p. 154):

"Q. Tell us whether or not, when the brake is put on, as the term is, hard, that is, the wheel turned as far as it will go, whether or not that absolutely signifies or shows that the brake is really on the car?

A. There is no assurance that it is applied.

Q. Why?

A. The chain may have too much slack, and may bind around the brake staff. There may be false motion in some of the rods."

Also,

Testimony of John I. Riegel (p. 161):

"By Mr. Demming:

Q. We will come back again. Does the length of time cars are allowed to stand on tracks enter into the condition as to whether or not those cars will move away?

A. Very materially.

Q. Tell us how.

A. In winding up the chain, the chain may lap falsely over one link or another, and in standing—some slight change in temperature—will either slip out, so as to release, or it will sag and drop.

Q. That is even when the brake is in perfect condition?

A. It is. Not absolutely perfect, but what is known as an efficient brake. The chain, in that instance, might be too long or the links might be too

large in diameter. Then the car may be so placed that the journals are not absolutely in their centre bearings.

MR. CAMPBELL: I object to this testimony.

By THE COURT:

Q. Are these matters you are relating—matters that in your experience as a railroad man have been a basis or the reason why cars run away?

A. They are.

Q. Really have been, upon experience, so found to have existed under certain conditions?

A. They are, and have been threshed out scores of times.

THE COURT: The objection is overruled."

Also on page 162:

"By MR. DEMMING:

Q. Finish the answer.

A. Then the car may be so placed that the journals are not in perfect centres as to bearings whereas the brake shoes could not compress tightly against the wheels in the first instance when cars will come to a settlement, and may either release, or in instances may grow tighter. The factor that it releases is always there. Then the false motion which exists at the various fulcrums may be such that a speck of rust will yield also, and release the car to a considerable extent. Those defects and considerable others running possibly to a dozen more or less of minor details. After that we have the element of the radiation of the wheels which tend to keep the car in motion.

Q. All these elements, as we understand it, enter into the brakes that are considered safe, efficient, and without defects?

A. They are so considered in ordinary use.

Q. Are these conditions, as you have described them, well recognized by engineers in the construction and operation of railroads?

A. They certainly are, and engineers have been called upon to make provisions against their liability as far as possible.

Q. How long have they been so recognized?

A. Fifteen years and longer."

Again, on cross-examination of Mr. Riegel (p. 176):

"Q. What do you think might take place and probably would take place in twenty-four hours?

A. I have indicated already the dropping of the chain and a score or more circumstances that might happen, one of which might happen to one of these cars."

And on page 177:

"Q. You said there were twenty or thirty reasons why these cars would probably move out. Let us have each one of them, under the conditions as stated by me in that question?

A. The cars might have been so placed on a slight irregularity in the rail that the journals would press below——

Q. That is not in the question.

A. The track, as I saw it, and it must have been for years back, was quite irregular in surface. It was so placed that the wheels would not be in their perfect bearings. In that way the brakes might be released.

Q. Leave out "Might." Get down to probability.

A. Probably could be released on that particular car."

And on pages 189 and 190:

"Q. Do you mean to say that if you use this hand brake at all it will pull the piston out of the air cylinder?

A. Yes, it would to a certain extent. There would not be much travel, but it would be there.

Q. Where is the connection?

A. It is a false motion.

Q. Where is the connection?

A. The connection is in the lever, the brake lever.

Q. Have you anything here to show that? Don't you know that the piston does not move, as a matter of fact, with the application of the hand brake?

A. I do know that it does move to some extent.

Q. Not much?

A. It is not much, but we do not need very much.

Q. You are an expert on air brakes, are you not?

A. To that extent it will release, because of that fact."

But plaintiff in error does not need to depend upon her witnesses to sustain this contention. Defendant in error's own witnesses admitted it.

Testimony of William Sweeney (p. 248):

"Q. Has he an absolute idea?

A. To have an absolute idea of course he would have to see that the shoes were against the wheels.

Q. That is the only real test, is it not, to see? The object of turning the brake is to get the shoe against the wheel, is it not? You might turn the brake and the shoe not be against the wheel? Is not that correct?

A. It may be possible.

Q. What is that?

A. There may be a possibility of that.

Q. Might be a kink in the chain?

A. You could tell it.

Q. What is that?

A. You can feel that.

Q. You could put the brake on hard and the kink in that chain will be there?

A. No, sir.

Q. You do not think so?

A. No, sir, not as much as when the shoe is free.

Q. But it might be there with the brake put on?

A. Yes, sir, if it did not come in contact with the shaft."

Also testimony of P. J. Langan (p. 276):

"Q. Now I ask you this, since you have answered the question that way, can a brakeman tell, by simply putting on the brake—a hand brake—putting it on hard so it does not move any more—that that brake is on properly and sufficiently?

A. I would not say that he could tell—with the car standing?

Q. Yes.

A. I would not say that if a car was standing—now he has got to depend on the deflection of the brake beams to know whether there is any give or not. It may be possible there is a weak link in the chain, or something stretching.

Q. Or a kink in the chain?

A. Well, a kink would not have much to do with it, because the pressure would either loosen the kink or would fasten it to such an extent it would not let go afterwards.

Q. Suppose it was rusty?

A. You could not rust it in twenty-four hours.

Q. But suppose it was rusty when he put it on first

A. Well, rust—that would depend on the amount of rust. You want to remember that the chain connecting the tie rod to the cylinder lever is a link, therefore you have got the combined strength of the two thicknesses of the iron, and that is stronger than the pull rod itself."

Again, Mr. Langan testifies (pp. 282 and 283):

"Q. And therefore, in those "more" levers, there is more possibility of false motion?

A. The false motion does not cut any figure there. The fact is we must have the levers.

Q. The more levers you have, is it not a mechanical axiom that the more possibility there is of false motion?

A. If we could apply the brake without levers at all we would do so.

Q. Answer the question; is not that correct?

A. Yes.

Q. Is it not true that the only sure test of whether a brake is in efficient condition is by an examination of the parts of the brake, and not by merely putting on the brake through the wheel?

A. An examination of the parts on a standing application would not develop nearly as well a test as a running test, because the shoes may be against the wheel, but the brakeman, or the man who applies it, cannot tell with what force. When the car is in motion and the brake is applied he gets the efficiency.

Q. But when it is standing still he cannot tell?

A. When it is standing still he cannot get what we call an efficiency test.

Q. And cannot tell whether the shoe is against the rim of the wheel?

A. Oh, he can tell whether the shoe is in contact with the wheel or not; I mean the pressure applied. A shoe may be against the wheel, but it does not designate how much pressure is holding it there.

Q. And it does not designate whether or not that pressure is sufficient to hold the wheel and the car permanently?

A. Permanently?

Q. Yes.

A. That is up to us to determine on all our cars."

But, more important even than this, the yard men not only did not test or know the efficiency of the brakes on these cars, but they failed and neglected to employ all the brakes and other means which they had to hold these cars, and which it was their direct duty to do.

On the second one of these standing cars they failed to turn on the brake at all. This is shown by the testimony of Quintus Ruch, conductor, on page 220:

"Q. What did you mean a while ago when you said you did not know which car it was that did not have the brakes on? Did you not say that?

A. I did, yes, sir. I misquoted myself.

Q. Which car was it?

A. It certainly must have been the second to the engine.

Q. You think it must have been the second?

A. Yes, sir."

. . . . . .

"Q. Why did not you put the brake on?

A. Because I did not want to.

Q. Was that brake in good condition?

A. I do not know. I did not have hold of it.

Q. Was there any particular reason why you did not want to?

A. No particular reason, only I did not feel like climbing up. That was all.

Q. You did not get down and look at the brake staff, or the pawls or the ratchet wheels?

A. No, sir."

Now, while Quintus Ruch, the yard conductor, says he put two blocks under the wheels, William H. Grupe, another of the yard men and witness for defendant in error, says that only one block was put under (p. 233). Marsena Parsons, a witness for plaintiff in error, says there was but one block (p. 99). However this may be, the fact cannot be doubted that this block or blocks was most carelessly and indifferently placed.

Testimony of Quintus Ruch, the man who says he put them under, cross-examination (p. 228):

"Q. How did you put these blocks in; just throw them under the wheels?

A. No, sir, I kicked them under with my foot.

Q. Did not you say before: You just picked up some wood and threw it under the wheels? Is that it?

A. Yes, sir.

MR. CAMPBELL: Read the whole thing.

By MR. DEMMING:

Q. Is not that what you said before?

A. I do not remember.

Q. Is not that the truth?

A. It certainly must be, yes, sir.

Q. You just threw a block of wood under the wheels and walked away. Is not that so?

A. I did not just walk away at that time, no, sir.

Q. After throwing the block under the wheel of the second car you walked off?

A. We went about our work."

Now, the evidence is undoubted that it was not only the duty of the yard men to put the brakes on *all* these cars, but it was an iron-clad rule of the road that they must do so.

Testimony of John I. Riegel (p. 186):

"Q. What does the book of rules say about that in the Lackawanna Road?

A. That they must be all braked and blocked, if necessary, and every precaution taken so that they don't endanger the main line."

Defendant in error's own witness, P. J. Langan, an official of the road, admitted this (bottom of p. 270):

"Q. Then if you put on six cars the *brakes on each one of the six cars should be applied,* should they not?

A. *I would say yes.*

Q. That would be the duty of the trainmen, would it not?

A. That is the duty."

And yet again (p. 272):

"Q. I am asking you as to a safe operation of the road.

A. The safe operation, I have just told you, would be to apply *all the brakes* on the six cars."

. . . . . .

"Q. I am asking you as to the proper practice.

A. *The proper practice would be to apply all brakes.*

Q. *And not just one brake or two brakes?*

A. *No, sir.*

Q. And is it not also well recognized that, in addition to putting on the brakes of all cars so standing on grades approaching the main line, that the cars are blocked in addition?

A. We say, 'and other necessary precautions taken.' That is in the judgment of the men.

Q. We say? What do you mean by 'we say'?

A. *We have a rule to that effect.*"

In the face of all this evidence, can there remain any reasonable doubt as the existence of such evidence of negligence of defendant in error, and can any one possibly say there was no question of fact for the jury to pass upon?

But more and worse for defendant in error is to follow.

Plaintiff in error after great effort discovered and produced at the trial below three entirely disinterested witnesses—intelligent and impartial men—who were working on a slate dump, high up in the air, within a few feet of defendant in error's tracks, directly opposite this siding, and with every facility for a clear, unobstructed view of the country-side. Two of these men were owners of this particular quarry, and none of them could have any incentive to tell other than the

full truth. These three witnesses united in saying that they saw these six cars almost immediately as they started to move, and that absolutely no one was near them at the time, nor interfered, nor meddled with them in any way whatsoever. Their evidence is clear and unequivocal, and shows conclusively that the cars started to move themselves. One of these witnesses heard the loud squeaking of the wheels as they struggled to free themselves from the final restraint of friction, and slowly got under headway (p. 94).

These men did all they could to head off the cars, and scrambled down the rocks to give warning of the runaways, but their efforts, unfortunately, were unavailing (p. 106).

Plaintiff in error does not deem it necessary to quote here from the testimony of these men, set forth fully in the record (pp. 84 to 106).

Another and most important witness was located by plaintiff in error, Mr. Marsena Parsons, also connected with the Parsons Brothers' quarry situated alongside defendant in error's right of way at Pen Argyl Junction. This gentleman testified that he had occasion to pass near the track the afternoon preceding the accident, and noticed one block under the front right-hand side wheel of the first car (the same place where defendant in error's witnesses placed the block) and that the flange of the wheel was cutting into it.

On the morning of the accident, about a quarter of seven, he again passed near these cars and perceived that the flange of the wheel had cut much deeper into the block, being now *about three-quarters of the way through.*

Already, without any doubt, those cars were insidiously slipping, sliding, starting on their fatal journey, and about an hour thereafter they moved out.

Mr. Marsena Parsons testified as follows (pp. 98 to 100):

"Q. Had you noticed those cars before they ran away?

A. I did.

Q. When?

A. About a quarter of seven I noticed the cars.

Q. What morning?

A. The morning of the 21st, of the accident.

Q. The morning they ran away?

A. The morning they ran away, and the evening before they ran away, I noticed them.

Q. Just tell the court and jury what it was you noticed about a quarter of seven on the morning that they ran away.

A. I noticed that the stick that they had under the cars, to block the cars with, was almost cut in two. That is the only thing that I noticed.

Q. By the stick you mean the block?

A. The block, yes, sir.

Q. Where was this block?

A. Under the front wheel, on the right hand side.

Q. On the right hand side of the front car?

A. Of the front car.

Q. Was that the only block?

A. The only block that I saw—well, there was no other block on that side.

Q. You could see the other wheel on the front of that car?

A. Yes, sir.

Q. Was there any block there?

A. No, sir.

Q. How far through that block had the wheels cut?

A. I cannot be so positive, but I should judge about three-quarters of the way, perhaps more.

Q. At the time you passed?

A. Yes, sir.

Q. Did you make any mental note of the fact at that time?

A. I noticed it in particular. I did not say anything to anybody, but I noticed that block in particular.

Q. What did you think to yourself?

A. I thought that it——

(Objected to. Objection sustained.)

Q. Had you seen these cars before that, the afternoon before?

A. On the afternoon before, yes, sir.

Q. Had you noticed the position of the block then?

A. The impression in the block was not as deep as it was in the morning.

Q. Then you mean by that that the cars, the flanges of the wheel had cut much further through the block?

A. I do.

Q. From the previous afternoon up to that morning?

A. I do."

That all this evidence would impel any fair-minded jury to find a verdict against defendant in error hardly admits of a dispute.

Especially is this so when it is remembered that all this positive testimony in favor of the plaintiff in error must be taken into consideration in connection with the legal rule that all the presumptions were to be drawn in favor of the dead man, *except where the positive evidence was so clearly to the contrary that no other inference could properly be drawn from it.*

Davidson vs. Railway Co., 171 Pa. 522 (1895);

Elston vs. Railroad Co., 196 Pa. 595 (1900);
Boggs vs. Pittsburgh, etc., Ry Co., 216 Pa. 314 (1907);
Armstrong vs. Consolidated Traction Co., 216 Pa. 595 (1907);
Schwarz vs. Delaware, etc., R. R. Co., 218 Pa. 192 (1907);
Lehner vs. Pittsburgh, etc., Ry. Co., 223 Pa. 208 (1909);
Rowe vs. Western Maryland R. R. Co., 224 Pa. 405 and 460 (1909).

It could not be reasonably expected that plaintiff in error would have to produce witnesses who were minutely and carefully watching these cars from the moment they were placed on the siding to the moment they ran away. Nor does the law impose such an impossible duty.

As the Pennsylvania Supreme Court says in

Devlin vs. Beacon Light Co., 198 Pa. 585 (1901),

if

"the plaintiff showed a series of acts from which the inference of negligence on the part of the defendant arose; that inference was sufficient to carry the case to the jury; having once arisen, it remained until overcome by countervailing proof; whether it was overcome was a question of fact which the court could not determine."

This Court has emphatically affirmed this same doctrine in numerous decisions.

It is unnecessary to refer to these decisions specifically and in detail. They seem to be all compre-

hended and the general subject expounded in the case of

Kreigh vs. Westinghouse, Church, Kerr & Co., 214 U. S. 249 (1909),

where this Court states:

> "Questions of negligence do not become questions of law except WHERE ALL REASONABLE MEN MUST DRAW THE SAME CONCLUSION from the evidence, nor should a case be withdrawn from the jury unless the conclusion follows as a matter of law that NO RECOVERY CAN BE HAD UPON ANY VIEW which can be properly taken of the facts which the evidence tends to establish."

As to the contention by defendant in error that the judgment of the Circuit Court of Appeals in the former and common law suit is *res judicata* of the present suit brought strictly and solely under the provisions of the Acts of Congress of 1908 and 1910, such contention cannot stand in the light of the decisions of this Court interpreting and construing these very acts.

The main argument of plaintiff in error on this point is contained in her first brief filed, as this was the one reason given for the reversal of the verdict rendered in her favor in the court below by the Circuit Court of Appeals. Since that brief was filed, however, the attention of counsel for plaintiff in error has been called to the opinion of this Court in the case of

American Railway Company of Porto Rico vs. Birch, 224 U. S. 547 (1912),

where this Court says unequivocally that the provisions of these Acts of Congress, with reference to the

bringing of suits under them by personal representatives, must be literally complied with. The first suit, therefore, brought by Lizzie M. Troxell individually, is unmistakably by a different party from the second and present suit brought by Lizzie M. Troxell, administratrix, and judgment in the first suit cannot be *res adjudicata* of the second suit.

It is respectfully submitted, therefore, that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed, and judgment on the verdict originally rendered ordered to be re-entered in favor of plaintiff in error.

GEORGE DEMMING,
Attorney for Plaintiff in Error.